ODIN OILFIELD SERVICES SDN BHD v. OMEGA COMPLETION TECHNOLOGY LTD

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN JC
[CIVIL SUIT NO: 22NCVC-232-05-2014]
16 APRIL 2015

CIVIL PROCEDURE: *Service – Out of jurisdiction – Application to set aside ex-parte order to serve notice of writ out of jurisdiction – Determination of jurisdiction – Place where termination of agreement occurred – Whether repudiation complete once communication of termination sent – Whether receipt of communication material – Whether proper case for grant of leave*

CIVIL PROCEDURE: *Pleadings – Defamation – Allegation of – Action against foreign defendant – Whether case for defamation properly pleaded – Doubts as to sufficiency of plaintiff's case – Whether case resolved in defendant's favour – Whether deficiency in pleadings curable by amendments*

The plaintiff was a company having a registered office and place of business in Malaysia whilst the defendant was a foreign entity having a registered office and place of business in Aberdeen, Scotland. The plaintiff claimed against the defendant for breach of contract allegedly by terminating the plaintiff as the defendant's exclusive agent. The plaintiff further alleged that the letter of termination contained matters which were defamatory of the plaintiff's reputation and it was published to a third party. The plaintiff obtained leave of court to serve notice of writ out of jurisdiction and duly served it on the defendant in Aberdeen. Hence, *vide* an application in encl. 16 herein, the defendant sought, *inter alia*: (i) to set aside the *ex-parte* order granting leave to the plaintiff to serve the notice of writ; (ii) consequential order that the writ and service of the notice of writ on the defendant be set aside; and (iii) a declaration that the court did not have jurisdiction over the defendant with respect to the plaintiff's claims and the reliefs sought therein. The termination letter was addressed to the plaintiff in Malaysia and was conveyed as an attachment *via* e-mail which was downloaded when the recipient was in Australia. For the purposes of determining jurisdiction, the legal question that arose was whether the alleged breach of contract occurred in Scotland or in Malaysia.

Held (allowing encl. 16 with costs):

(1) The act of repudiation is complete upon the communication being sent to the other side. The receipt of such communication by the latter is not a pre-requisite to the crystallisation of a cause of action. In the present case, the alleged breach of contract occurred in Scotland which was the place where the defendant had made the decision to terminate the agreement and communicated it by sending the letter of termination as

an attachment to an e-mail. Hence, in law and on the facts, the alleged repudiation of contract took place in Aberdeen, Scotland and was therefore not a proper case for the grant of leave for service of the notice of writ out of jurisdiction. (paras 33, 34 & 35)

(2) There was no arguable case for purposes of O. 11 of the Rules of Court 2012 *vis-à-vis* defamation as a case for defamation had not been properly pleaded in the statement of claim. Further, the jurisdiction over a foreign defendant has to be exercised with great care and caution. If there are any doubts as to the sufficiency of the plaintiff's case, such doubt should be resolved in favour of the defendant. In view of the fact that there were stringent requirements that must be met before the court could exercise jurisdiction over a party who is beyond the court's jurisdiction, the deficiencies in the pleadings could not be cured by the amendment. (paras 40 & 43)

Case(s) referred to:

Brinkibon Ltd v. Stahag Stahl GmbH [1980] Lloyds L Rep 556; [1983] 2 AC 34 ***(foll)***
Bunga Lawas Shipping Agencies Sdn Bhd v. Nusantara Worldwide Insurance (Malaysia) Bhd & Ors [1999] 2 CLJ 731 HC ***(not foll)***
Dow Jones & Company Inc v. Gutnick [2002] HCA 56 ***(refd)***
Lim Kit Siang v. Datuk Dr Ling Liong Sik & Ors [1996] 1 LNS 106 HC ***(refd)***
Thomas and Anor v. BPE Solicitors (a firm) [2010] EWHC 306 ***(dist)***
Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo) [1949] AC 326 (HL) ***(refd)***
Vitkovice Horni A Hutni Tezirsto v. Korner [1951] AC 869 (HL) ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(a), (b)
Electronic Commerce Act 2006, ss. 20, 21, 22, 23
Rules of Court 2012, O. 11 rr. 1(1), (G), (H), 4(1), (2), O. 18 r. 19

For the plaintiff - Raswinder Kaur; M/s Robert Devan & Co
For the defendant - HW Wong; M/s Tan Swee Im, PY Hoh & Tai

Reported by S Barathi

JUDGMENT

S Nantha Balan JC:

Introduction

[1] The plaintiff is a company incorporated under the Companies Act 1965 and having a registered office and place of business in Malaysia. The defendant is a foreign entity and has a registered office and place of business in Aberdeen, Scotland, United Kingdom. The plaintiff issued a writ against the defendant and obtained leave of court to serve notice of writ out of jurisdiction. The notice of writ was duly served on the defendant in Aberdeen. Thereafter the defendant filed the present application (encl. 16) to set aside the *ex-parte* order dated 30 May 2014 granting leave to the plaintiff

to serve the notice of writ out of jurisdiction. The defendant maintains that the plaintiff's claim does not fall under O. 11 r. 1(1), (G) and (H) of the Rules of Court 2012 ("ROC") for service of writ out of jurisdiction. Further, the defendant maintains that leave ought not to have been granted under O. 11 r. 4(2) ROC.

[2] Order 11 rr. 1(1), (G) and (H) and r. 4(1) and (2) ROC are reproduced below:

Order 11 rule 1

1. **Principal cases in which service of notice of Writ out of the jurisdiction is permissible (O. 11 r. 1)**

(1) Where the Writ does not contain any claim for damage, loss of life or personal injury arising out of —

(a) a collision between ships;

(b) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or

(c) non-compliance on the part one or more of two or more ships, with the collision regulations made under section 252 of the Merchant Shipping Ordinance 1952 [Ord. 70/1952],

service of a notice of a Writ out of the jurisdiction is permissible with the leave of the Court in the following cases:

...

(G) if the action begun by Writ is brought against a defendant **in respect of a breach committed within the jurisdiction of a contract** made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;

(H) if the action begun by the Writ is founded on a **tort committed within the jurisdiction**;

(emphasis added)

Order 11 rule 4:

Application for, and grant of, leave to serve notice of Writ out of the jurisdiction

4.(1) An application for the grant of leave under rule 1 or 2 shall be supported by an affidavit in Form 8 stating the grounds on which the application is made and that in the deponent's belief, **the plaintiff has a good cause of action**, and showing in what place or country the defendant is, or probably may be found.

(2) Such leave shall not be granted **unless it is made sufficiently to appear to the Court that the case is proper one for service out of the jurisdiction** under this Order.

A (3) An order in Form 9 granting, under rule 1 or 2, leave to serve a notice of a Writ out of the jurisdiction shall limit a time within which the defendant to be served must enter appearance.

[3] The defendant also seeks a consequential order that the writ dated 16 May 2014 and service of the notice of writ on the defendant in the United B Kingdom on 21 November 2014 and 24 November 2014 be set aside.

[4] Finally, the defendant also seeks a declaration that this court does not have jurisdiction over the defendant with respect to the plaintiff's claims and the reliefs sought therein. The defendant also seeks an order for stay of proceedings and costs of this application.

C

The Plaintiff's Claim

[5] The plaintiff's claim against the defendant is for breach of contract and defamation. According to the plaintiff, the defendant committed breach of contract by issuing a letter of termination dated 10 May 2013 and thereby D terminating the plaintiff as the defendant's exclusive agent. (see paras. 11 and 12 of the statement of claim).

[6] As for defamation, the plaintiff alleges that the letter of termination contained matters which were defamatory of the plaintiff's reputation and that it had been published to a third party. In this regard, the plaintiff alleges E that the letter had been disclosed by the defendant to Petroleum Nasional Berhad or "PETRONAS" and that they were thereby defamed by the defendant.

The Contract Of Agency Between The Plaintiff And Defendant

F **[7]** Pursuant to a commercial agency agreement dated 18 April 2012 ("the CAA") (exh. MB-4 encl. 17) which was entered into between the plaintiff and defendant, the plaintiff was appointed as the exclusive agent and representative for the defendant for the territory of Malaysia and other surrounding geographical jurisdictions.

G **[8]** Pursuant to the CAA, the plaintiff was to represent the defendant for the purpose of assisting it in acquiring contracts and purchase orders for the supply of equipment and services for Australia, Papua New Guinea, New Zealand, Brunei, India, Indonesia, Malaysia, Myanmar, Thailand and Vietnam and any other areas as may be subsequently agreed upon on a case H by case basis. (see cl. 2 of the CAA).

Cause Of Action For Breach Of Contract; Where Did It Take Place?

[9] In their application to set aside the order granting leave to serve the notice of writ out of jurisdiction and to set aside service of the writ and the I writ itself, the defendant had initially relied on various grounds. However, counsel for both sides finally agreed that the defendant's application with respect to that part of the plaintiff's claim which relates to breach of contract, will be determined on the sole issue of whether the alleged breach of contract

occurred in Malaysia or in Scotland. It was therefore agreed that if the court makes a finding that the alleged breach of contract occurred in Malaysia, then it follows that this court has the requisite jurisdiction and the defendant's application will fail and *vice-versa*.

[10] As such, for purposes of the defendant's said application, nothing more needs to be said about the reasons which impelled the defendant to terminate the CAA as there was only one issue pertaining to the claim for breach of contract which had to be determined.

[11] The starting point in the factual analysis is that there is no dispute that the termination letter dated 10 May 2013 (exh. MB-6 encl. 17) was issued by the defendant in Aberdeen, Scotland and was sent as an attachment to an email dated 10 May 2013. The email was sent by one John Donachie on behalf of the defendant to Joseph Collins who is the plaintiff's chief executive officer and director. In this regard, it is relevant to refer to an affidavit by Mark Buyers (on behalf of the defendant) affirmed on 25 March 2015 where he states as follows:

> 4. In reply to paragraph 4 of the Plaintiff's affidavit, I wish to state that Mr. John Donachie acting on behalf of the Defendant had on 10.5.2013 by email forwarded to Mr. Joseph Collins' email a copy of the termination letter that was issued by the Defendant from their office in Aberdeen, Scotland on 10.5.2013. I am informed by Mr. Donachie that before sending the email he had telephoned Mr. Collins in Perth, Australia to inform him in advance of the Defendant's intention to give a month's notice to terminate the agency agreement.
>
> 5. Further, I am advised and I verily believe that Mr. Collins was in Australia at the material time as this is confirmed by the Plaintiff's own documents. I refer to Mr. Collins' email dated 14.5.2013 where he said he will be attending an exhibition in Brisbane, Australia on 20.5.2013 and 26.5.2013 and also that he will be in Kuala Lumpur on 6.6.2013. Mr. Collins therefore did not appear to have downloaded the termination letter in Malaysia since he was most probably in Australia and not Malaysia at the material time.

[12] It therefore appears that the defendant's email was downloaded when the recipient was out of Malaysia. However, for present purposes the argument has not been taken by counsel for the defendant that by reason of the email being downloaded outside of Malaysia, the place where the cause of action had accrued has been altered. In the present situation, it is critical to note that the termination letter was addressed to the plaintiff in Malaysia and was conveyed as an attachment *via* email which was downloaded when the recipient (Joseph Collins) was in Australia.

[13] For all intents and purposes, the termination was sent in the form of a letter to an address in Malaysia and therefore received in Malaysia. I shall however leave open the question which may have to be answered on another

occasion as to whether the downloading of an email with a letter attached to it can be construed as having been sent to the jurisdiction where the email was downloaded or whether jurisdiction follows the address stipulated in the letter. That argument may arise in a different context or in respect of some other cause of action. For the reasons that will become obvious in the subsequent parts of this judgment, in the context of determining where the repudiation of contract took place in the present situation, it matters not whether the email containing the letter of termination was downloaded in Malaysia or in Australia. As such for this case, the question was and still is, whether the breach of contract occurred in Scotland or in Malaysia.

[14] Hence, the critical question presently is whether the cause of action for breach of contract occurred in Scotland where the defendant made the decision to terminate the CAA and reduced it in writing and sent the same *via* email attachment on 10 May 2013 or whether the breach occurred when the letter of termination was communicated to the plaintiff when the email was received (downloaded) by Joseph Collins on the same day at 11.08pm, *albeit* that he was in Australia at the material time.

[15] As such, for purposes of determining jurisdiction, the legal question that arises is whether the alleged repudiation of contract by the defendant occurred in Scotland or in Malaysia. The classic case on the issue of formation/repudiation of contract *via* instantaneous communication is the case of *Brinkibon Ltd v. Stahag Stahl GmbH* [1980] Lloyds L Rep 556 (CA) ("the *Brinkibon*'s case") which was decided by the English Court of Appeal. Apart from the Court of Appeal's decision, there is also a decision by the House of Lords arising out of the same case. However, it is my view that the judgment of the Court of Appeal in the *Brinkibon*'s case is more relevant to the question as to where repudiation of contract had occurred. As such, for purposes of this judgment, the focus will be on the Court of Appeal's judgment.

[16] In that case, the English Court of Appeal dealt with the question of whether repudiation occurs at the place where the decision was made to repudiate and from where the communication *via* telex (or any other instantaneous made of communication) was sent or alternatively the breach crystallises at the place where the communication (in respect of repudiation) was received.

[17] The following passage from the judgment of Stephenson LJ in the *Brinkibon*'s case is instructive on this point:

> But Mr. Justice Lloyd held in *Atlantic v. Milano* that a repudiation by telex sent from Milan was a breach committed in Italy on the authority of *Martin v. Stout*: see [1979] 2 Lloyd's Rep. at p.247. I am satisfied that Mr. Justice Mocatta was regarding the difference between the cable sent in *Martin v. Stout* and the telexes sent in *Atlantic v. Milano* and in this case as immaterial.

In my judgment, that is right. In *Martin v. Stout* the Privy Council advised his Majesty that a repudiatory telegram handed in to the telegraph office in London constituted a breach of contract committed there and not in Egypt, the country to which it was sent. They followed English cases on repudiatory letters in the first of which, *Cherry v. Thompson*, (1872) L.R. 7 Q. B. 573, the plaintiff sued a lady for breach of contract to marry in declining, by a letter posted in Germany to a man in England, to carry out her engagement. In giving the judgment of the Court of Queen's Bench Mr. Justice Blackburn said:

... In this case the receipt of the letter by the plaintiff in England furnished him with evidence that the defendant had in Germany renounced that relation. Had his letter followed him to Ireland he would have received the evidence in Ireland. But the act which he had the option to treat as a breach took place in Germany, and in Germany alone.

That case had been followed twice by this Court, in *Holland v. Bennett*, [1902] 1 K.B. 867 and *Mutzen-Becher v. La Aseguradora Espanola*, [1906] 1 K.B. 254. In none of those three cases nor in *Martin v. Stout* itself does it appear that the decision was based on the doctrine that the post office may be the agent of the recipient to receive a letter or telegram, although it was so argued in *Holland v. Bennet*, [1902] 1 K.B. 868. The simple question, as with all breaches of contract, seems to have been; where was the repudiatory act done? Where was the unlawful act committed?

...

(See p. 563 of the judgment)

[18] At p. 564 of the judgment, in the same case, Templeman LJ made the following point about the place where repudiation takes place. He said:

Acceptance of an offer must however, save in circumstances not here material, be communicated in order that the contract may be constituted. Repudiation on the other hand is an act or conduct evincing an intention not to be bound by the contract. The act in the present case was the act of the sellers in Austria in determining to repudiate and in sending the telex of repudiation. The breach of contract occurred in Austria where the sellers determined to repudiate and where they took effective steps to communicate that determination to the buyers.

Thus in *Martin v. Stout*, [1925] A.C. 359 at p. 368 Lord Atkinson in delivering the judgment of the Judicial Committee of the Privy Council held that a repudiatory cable dispatched from London to Egypt was a breach of contract in London. The cable was only evidence of a breach of contract, not the breach itself which was constituted by the determination of the sender of the cable to avoid the contract. Lord Atkinson did not rely on the fact that the cable had been dispatched from London but on the fact that the cable was only evidence of a breach already committed in London.

[19] Thus, the principle that was clearly established by the Court of Appeal in the *Brinkibon*'s case is that breach of contract occurs in the place where the party who is repudiating makes the decision to repudiate and from which place steps are taken to communicate the decision to the other side.

[20] On the other hand, counsel for the plaintiff relied on *Bunga Lawas Shipping Agencies Sdn Bhd v. Nusantara Worldwide Insurance (Malaysia) Bhd & Ors* [1999] 2 CLJ 731 ("*Bunga Lawas*' case") and contended that repudiation of contract takes place where the letter of repudiation is communicated to and received by the other side (ie, by the party alleging breach of contract).

[21] The facts of the *Bunga Lawas*' case are as follows:

(a) The plaintiff who had its registered office in Kuala Lumpur was the owner of a vessel which was registered in Penang;

(b) At the material time, the vessel was insured with the defendants, all of which were insurance companies with registered offices in Kuala Lumpur. As it transpired, the vessel was lost or stolen in Thailand and the plaintiff lodged a claim with the defendants;

(c) By a letter addressed to the plaintiff in Miri, Sarawak, the defendants repudiated liability;

(d) The plaintiff then filed an action against the defendants in the High Court in Sabah & Sarawak at Miri;

(e) At the hearing, the defendants submitted that the High Court in Sabah & Sarawak at Miri had no jurisdiction to try the action as all the defendants which were registered in Kuala Lumpur and the vessel which was registered in Penang were outside the local jurisdiction of the High Court in Sabah & Sarawak by virtue of s. 23(1)(b) of the Courts of Judicature Act 1964 ('the CJA'); and

(f) Conversely, the plaintiff took the position that the instant court was seised of the jurisdiction by virtue of s. 23(1)(a) of the CJA as the cause of action (breach of contract of insurance by the defendants) arose in Miri, Sarawak.

[22] In the *Bunga Lawas*' case, the High Court held that the cause of action arose in Miri, Sarawak. The relevant part of the judgment (at p. 736) reads as follows:

> It is my opinion that para. (a) to the said s. 23(1) is relevant and applicable to the present case. This is a dispute relating to an insurance contract made between the plaintiff and the defendants. As such the only issue for determination for the purpose of this application is where did the breach of contract occur? In *Distillers Co. (Bio-Chemicals) Ltd v. Thompson (by her next friend Arthur Leslie Thompson)* [1971] 1 All ER 694 the point at issue was whether the claim alleged against the first defendant was a cause of action which arose within the jurisdiction of the Supreme Court of New South Wales within the meaning of s. 18(4)(a) of the Common Law Procedure Act 1899 of New South Wales.
>
> The Privy Council held that it was necessary that every ingredient of the cause of action should have occurred within the jurisdiction, nor was it necessary, or sufficient, that the last ingredient, ie, that which completed

the cause of action, should have occurred within the jurisdiction, what was necessary was that the act, or omission, on the part of the defendant which gave the plaintiff his cause of complaint should have been formed within the jurisdiction. In the present case I agree with learned counsel for the plaintiff that the act which gave the plaintiff the cause of complaint was the rejection by the respondents of the insurance claim submitted by the plaintiff. It was communicated to and received by the plaintiff at the plaintiff's place of business and office address at Miri, Sarawak. Hence, the breach of contract occurred in Miri, Sarawak.

[23] Counsel for the plaintiff also referred to the case of *Thomas and Anor v. BPE Solicitors (a firm)* [2010] EWHC 306 (Ch.) for the proposition that the postal rule is inapplicable to email communication and that the question whether an email acceptance is effective when it arrives, or at the time when the offer could reasonably be expected to have read it. The following passage was referred to in aid of counsel's submission:

86. The general rule is that the acceptance of an offer is not effective until communicated to the offeror. The "postal rule" is an anomalous exception to the general rule, which is limited to its particular circumstances. It does not apply to acceptances made by some "instantaneous" mode of communication (*Chitty on Contracts*, 30th edn, paragraph 2-050). This was decided in *Entores Ltd v. Miles Far East Corporation* [1955] 2 QB 327 as regards communications by telex. At page 334, Denning LJ said that in such a case, "The contract is only complete when the acceptance is received by the offeror". Contrary to the claimants' submissions, in my view the same principle applies to communication by email, at least where the parties are conducting the matter by email, as the solicitors were in this case. However, that does not conclude the question, because issues may remain as to when the email in question was received (and also whether it was received). As Lord Wilberforce put it in *Brinkibon Ltd v. Stahag Stahl G.m.b.h.* [1983] 2 AC 34 (another telex case in which *Entores* was approved) at page 42:

> Where the condition of simultaneity is met, and where it appears to be within the mutual intention of the parties that contractual exchanges should take place in this way, I think it a sound rule, but not necessarily a universal rule.
>
> ... The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or upon the assumption, that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variations may occur.

87. Similar issues arise when the medium of communication is by email. In *Brinkibon*, Lord Wilberforce's conclusion was that:

> No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.

88. In *Bernuth Lines Limited v. High Seas Shipping Ltd* [2006] 1 Lloyds Rep. 537, it was held that notice of arbitration was validly served by email notwithstanding that it may not have reached the relevant managerial or legal staff in the recipient company. Christopher Clarke J said at p. 541-2:

> [29] That is not to say that clicking on the "send" icon automatically amounts to good service. The e-mail must, of course, be despatched to what is, in fact, the e-mail address of the intended recipient. It must not be rejected by the system. If the sender does not require confirmation of receipt he may not be able to show that receipt has occurred. There may be circumstances where, for instance, there are several e-mail addresses for a number of different divisions of the same company, possibly in different countries, where despatch to a particular e-mail address is not effective service.

89. These particular considerations do not apply in the present case. It is not in dispute that the email was received in Mr Cusack's mailbox at or close to 18:00 on 24 August 2007, and was available to be read by him. The question is whether the defendants are correct in their submission that acceptance was not effective from the moment the email was received because it was sent after working hours. In those circumstances, it is submitted, relying on the passage in Lord Wilberforce's judgment that I have quoted, acceptance by the 18.00 email could not in any event have been effective until it came to Mr Cusack's eye on Tuesday morning.

90. Once one sets aside the "postal rule" as inapplicable to email communications, the question whether an email acceptance is effective when it arrives, or at the time when the offeror could reasonably be expected to have read it, is not a straightforward one, and does not appear to be settled by authority. On the basis that it must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie (*Brinkibon* at page 42), the answer does however appear to me to be clear in the present case. In the context in which the 18:00 email was sent — that is a transaction which (as the earlier emails show) could have been completed that evening — I do not consider that 18:00 was outside working hours. The email was available to be read within working hours, despite the fact that Mr Cusack had in fact gone home. For that reason, I would have held that were the defendants to have accepted the Rickerbys undertaking by Mr Dew's email, then as a matter of law such acceptance would have been effective upon the receipt of the email at or about 18:00. However, as I have held, they did not do so, nor were they negligent in that regard.

[24] Counsel for the plaintiff also referred to the Electronic Commerce Act 2006 ("the EC Act") and in particular to ss. 20, 21, 22 and 23 of the EC Act. They provide as follows:

20. Time of dispatch

Unless otherwise agreed between the originator and the addressee, an electronic message is deemed sent when it enters an information processing system outside the control of the originator.

21. Time of receipt

Unless otherwise agreed between the originator and the addressee, an electronic message is deemed received —

(a) where the addressee has designated an information processing system for the purpose of receiving electronic messages, when the electronic message enters the designated information processing system; or

(b) where the addressee has not designated an information processing system for the purpose of receiving electronic messages, when the electronic message comes to the knowledge of the addressee.

22. Place of dispatch

Unless otherwise agreed between the originator and the addressee, an electronic message is deemed sent from the originator's place of business, and —

(a) where the originator has more than one place of business, from the place of business that has the closest relationship with the transaction or where there is no place of business that has the closest relationship with the transaction, from the originator's principal place of business; or

(b) where the originator does not have a place of business, from the originator's ordinary place of residence.

23. Place of receipt

Unless otherwise agreed between the originator and the addressee, an electronic message is deemed received at the addressee's place of business, and —

(a) where the addressee has more than one place of business, at the place of business that has the closest relationship with the transaction or where there is no place of business that has the closest relationship with the underlying transaction, at the addressee's principal place of business; or

(b) where the addressee does not have a place of business, at the addressee's ordinary place of residence.

[25] It was submitted that following the relevant provisions of the EC Act, notification of the repudiation by the defendant was complete only when the email was received by the recipient. On that analysis, it was submitted for the plaintiff that repudiation of the CAA took place in Malaysia.

A **Findings – Where Did The Breach Of Contract Occur?**

[26] As the outset, I take the view that the decision of the High Court in *Bunga Lawas* (*supra*) is not persuasive as that case relied upon a decision of the Privy Council (*Distiller*'s case) which was a case in negligence whereas the *Brinkibon* case which was decided by the Court of Appeal pointedly dealt with repudiation of contract and is thus more compelling as a case authority.

[27] Further, it appears that the *Brinkibon*'s case was not brought to the attention of the learned judge in the *Bunga Lawas*' case and the outcome may well have been different if the court had been apprised of the principles that were enunciated by the Court of Appeal in the *Brinkibon*'s case.

[28] I stated earlier that the *Brinkibon*'s case went on appeal to the House of Lords. It is clear from the reported judgment (See: *Brinkibon Ltd v. Stahag Stahl* [1983] 2 AC p. 34) that the House of Lords dismissed the appeal but on different grounds. Based on the facts of that case and on the pleadings, the House of Lords held that repudiation took place in Austria which is where the sellers had failed to take out a performance bond and to supply the steel.

[29] Nevertheless, it does not appear that the House of Lords had doubted the correctness of the pronouncements made by the Court of Appeal as regards the place where a breach of contract occurs for purposes of determining the place where repudiation had taken place. In *Brinkibon*'s case, the House of Lords ultimately held that breach of contract in that case was occasioned by non-performance of an obligation which ought to have been done outside the jurisdiction. Hence, the pronouncements by the Court of Appeal on the issue of repudiation by way of instantaneous communication may well be regarded as *obiter*.

[30] In any event, even if the pronouncements made by the Court of Appeal are *obiter*, they are nevertheless of strong persuasive value, especially since the principles are predicated on a series of earlier cases which support the position as to where repudiation occurs in such a situation. In the present case, I was not referred to any authority from any Commonwealth jurisdiction which had doubted or rejected the Court of Appeal's pronouncement on this point.

[31] The case of *Thomas and Anor v. BPE Solicitors (a firm)* [2010] EWHC 306 (Ch.) which was referred by counsel for the plaintiff is of no assistance as that case deals with an offer/acceptance situation. Also, I am of the view that the provisions of the EC Act are irrelevant as this is not a commercial transaction which was conducted through electronic means. In any event, even if the EC Act applies, it still does not affect the outcome as there is no issue as to when the email was sent and when it was received. Those matters are not even in dispute. I would go so far as to say that the factual matrix relating to the sending and receiving of the email pertaining to the letter of termination are not in dispute. The question that arises is purely legal one and based on the principles adverted to by the English Court of Appeal in

Brinkibon's case, the position is clear in that repudiation takes place in the jurisdiction where the intention/decision to repudiate is made and steps are taken to communicate it to the other side.

[32] In the upshot, I am of the view that the rules relating to formation of contract are quite different from repudiation of contract. Based on the cases referred to above, the general rule as I see it, is that repudiation of contract occurs or crystallises when the act or decision is made to repudiate a contract and steps are taken to communicate the decision to repudiate to the other side.

[33] As such, the act of repudiation is complete upon the communication being sent to the other side and the receipt of such communication by the latter is not a pre-requisite to the crystallisation of a cause of action, unless perhaps there is something to the contrary in the underlying contract which may operate as an exception to the general rule alluded to above. Here, there is no suggestion that there is any contractual basis for any exception to the general rule.

[34] In the result, upon applying the principles enunciated by the Court of Appeal in *Brinkibon*'s case to the facts of this case, it is my view that the alleged breach of contract occurred in Scotland which is the place where the defendant had made the decision to terminate the CAA and communicated it by sending the letter of termination as an attachment to an email.

[35] To conclude, I am fortified in my conclusion that in law and on the facts, the alleged repudiation of contract in the present case took place in Aberdeen, Scotland. Hence, this is not a proper case for the grant of leave for service of the notice of writ out of jurisdiction.

Defamation – The Plaintiff's Pleaded Case

[36] I now turn to the plaintiff's claim in defamation. The following paragraphs of the statement of claim relate to the plaintiff's claim in defamation:

> 16. This letter includes a series of unsubstantiated and damaging claims and observations regarding the capabilities of the Plaintiff, to a number of business associates and clients of the Plaintiff, whom the Plaintiff had introduced to the Defendant. Not least, the Defendant sent this same letter to the PETRONAS Licensing and registration committee and/or department and this has given cause for the PETRONAS Licences to be revoked, based solely on the unsubstantiated and defamatory claims made in the Defendant's Letter of Termination.
>
> 17. In addition, the Plaintiff has been asked to explain to a number of their long-term associates and clients in the region why the Defendant should drop the Plaintiff from their services without any explanation and why the Plaintiff is no longer representing the Defendant. The long-term reputation of the Plaintiff amongst the

A oil and/or gas business community, built over 16 years of working in Malaysia, has therefore been besmirched and defamed by the Defendant by way of public exposure of the unsubstantiated contents of what should have remained an internal correspondence between the two parties.

B **[37]** Counsel for the defendant conceded that following *Dow Jones & Company Inc v. Gutnick* [2002] HCA 56, the plaintiffs alleged cause of action for defamation would have occurred in Malaysia, which is the place where the impugned letter was communicated to PETRONAS. However, it was contended by counsel for the defendant that the plaintiff's claim in C defamation is nevertheless unsustainable and unmaintainable as the words which are said to be defamatory of the plaintiff have not been reproduced in the statement of claim.

[38] As such, it is alleged that there is no arguable case *vis-a-vis* an action for defamation. The reply by counsel for the plaintiff was that any omission D in the pleadings can be cured by amendment.

[39] Counsel for the defendant referred to *Lim Kit Siang v. Datuk Dr Ling Liong Sik & Ors* [1996] 1 LNS 106; [1997] 5 MLJ 523, where the action in defamation was struck out as the actual words which were said to be defamatory of the plaintiff were not set out in the statement of claim. The E following passage from the judgment is relevant:

> The authorities are manifest in their approach that it is fundamental that the exact words as uttered (by the first defendant in this case) must be reproduced in the original language with a certified translation in the language of the court, in the absence of which the claim will fail.
>
> F The statement of claim appears to be bereft of certain basic requirements. Paragraph 7 (p. 10 of the bundle of pleadings) alleges that the first defendant spoke at an anniversary dinner. What the first defendant said was subsequently converted into print. The quoted words of the report (not the actual speech of the first defendant) refer to what was allegedly G said later. In short, the main part of para. 7 bears no connection with what follows in the quotation.
>
> The case of *Bruce v. Odhams Press Ltd* [1936] 1 KB 697 is succinct on the rule that pleadings of this nature must be clear and the particulars must bear out what is alleged in the main allegation which is the material allegation.
>
> H It behoves me to echo the principles as laid down in authorities such as *Harris v. Warre* (1879) 4 CPD 125 and *Workers' Party v. Tay Boon Too* [1975] 1 MLJ 47 that the importance of the actual words uttered in the pleadings has always been a recurrent reminder, since in a libel, the words used are the material facts and must therefore be set out in the statement of claim. It is not good to merely describe their substance, I purpose or effect. The law requires the very words in the libel to be set out in the declaration in order that the court may judge whether they constitute a ground of action.

[40] I am inclined to agree with the submission made by counsel for the defendant, that there is no arguable case for purposes of O. 11 *vis-a-vis* defamation as a case for defamation has not been properly pleaded in the statement of claim. In view of the fact that there are stringent requirements that must be met before this court can exercise jurisdiction over a party who is beyond this court's jurisdiction, I am unable to accept the submission made on behalf of the plaintiff that the deficiencies in the pleadings can be cured by amendment.

[41] Of course, it may be permissible for such an argument to be taken in the context of a striking out application under O. 18 r. 19 ROC where the court may, in the exercise of its discretion, allow an amendment *in lieu* of striking out an action, but not so in the context of a notice of writ which is to served out of jurisdiction.

[42] I am therefore not persuaded that in an application to set aside the order granting leave for service of notice of writ out of jurisdiction and service of writ and the writ itself, defects in pleadings can be indulged or accommodated or condoned with a view to allowing an amendment later on. That would be unfair to the defendant who is beyond the jurisdiction and who has been put to expense and inconvenience of taking out the present application. In the circumstances, I hold that on the pleadings there is no valid cause of action in defamation.

[43] In arriving at the above conclusion, I am reminded that the exercise of jurisdiction over a foreign defendant is one which has to be exercised with great care and caution and if there are any doubts, as to the sufficiency of the plaintiff's case, then such doubts should be resolved in favour of the defendant. The following passage from the judgment in the case of *Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo)* [1949] AC 326 (HL) makes the point clearly:

> I will conclude by saying that, whether in considering the interpretation of the rule or in exercising the discretion that arises when a case is brought within it, the underlying and guiding principle is that which was long ago stated by Pearson J. In S*ociette Generale de Paris v. Dreyfus Brothers (I)*, that it "ought always to be considered a very serious question" "... whether this court ought to put a foreigner, who owes" "no allegiance here, to the inconvenience and annoyance" "of being brought to contest his rights in this country ...".
>
> (see p. 350 of the judgment)

[44] The same sentiment was expressed by Lord Tucker in *Vitkovice Horni A Hutni Tezirsto v. Korner* [1951] AC 869 (HL) where he said:

> it is to be remembered that it has frequently been laid down that this jurisdiction is to be exercised with great care and that any doubts should be resolved in favour of the foreigner.
>
> (see p. 889 of the judgment)

[45] In the result, and for the reasons as discussed above, I find that there is merit in the defendant's application and therefore allowed encl. 16 with costs of RM8,000 to be paid by the plaintiff to the defendant.

Order accordingly.